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UNITED STATES DISTRICT COURT  
DISTRICT OF NEVADA

10 MAYFIELD ALLEN KIPER,

11 Petitioner,

12 vs.

13 NEVADA BOARD OF PAROLE  
14 COMMISSIONERS, *et al.*,

15 Respondents.

3:06-cv-0446-ECR-VPC

ORDER

16  
17 This action proceeds on a petition for writ of habeas corpus pursuant to 28 U.S.C. §  
18 2254, by petitioner Mayfield Allen Kiper, a Nevada prisoner. On June 30, 2009, this Court  
19 determined that grounds two and three of the federal habeas corpus petition were unexhausted  
20 (docket #27). The Court gave petitioner thirty days to determine whether he wished to either  
21 abandon the unexhausted claims, dismiss the petition without prejudice and return to state court to  
22 exhaust, or to move for a stay and abeyance.

23 Petitioner has filed a response to the order (docket #28). Petitioner states that he does  
24 not wish to abandon any of the grounds contained in his federal petition. Petitioner also notes that this  
25 Court “can file its order denying, dismissing” his petition and he will present his case to the appellate  
26 court. As this Court cannot entertain a habeas petition that contains both exhausted and unexhausted

1 claims, and because petitioner refuses to abandon his unexhausted grounds or move for a stay and  
 2 abeyance in order to return to state court to exhaust the unexhausted claims, the Court finds that the  
 3 petition is “mixed” and shall be dismissed without prejudice. *See Rose v. Lundy*, 455 U.S. 509, 510  
 4 (1982); *Szeto v. Rushen*, 709 F.2d 1340, 1341 (9th Cir.1983).

5 **Certificate of Appealability**

6 In order to proceed with an appeal from this court, petitioner must receive a  
 7 certificate of appealability. 28 U.S.C. § 2253(c)(1). Generally, a petitioner must make “a substantial  
 8 showing of the denial of a constitutional right” to warrant a certificate of appealability. *Id.* The  
 9 Supreme Court has held that a petitioner “must demonstrate that reasonable jurists would find the  
 10 district court’s assessment of the constitutional claims debatable or wrong.” *Slack v. McDaniel*, 529  
 11 U.S. 473, 484 (2000).

12 Where a court has dismissed a petitioner’s habeas corpus petition on procedural  
 13 grounds, however, the determination of whether a certificate of appealability issues becomes a two-  
 14 part test. The Supreme Court has stated that under such circumstances:

15 A COA should issue when the prisoner shows...that jurists of reason  
 16 would find it debatable whether the petition states a valid claim of the  
 17 denial of a constitutional right and that jurists of reason would find it  
 18 debatable whether the district court was correct in its procedural ruling.

19 *Id. See also Miller-El v. Cockrell*, 537 U.S. 322, 337-38 (2003). Therefore, in order to obtain a  
 20 COA in cases dismissed on procedural grounds, petitioner has the burden of demonstrating both that  
 21 he was denied a valid constitutional right *and* that jurists of reason would find it debatable whether  
 22 the court’s procedural ruling was correct. In cases where there is a plain procedural bar to a  
 23 petitioner’s claims and the district court is correct to invoke that procedural bar to dispose of the  
 24 case, “a reasonable jurist could not conclude either that the district court erred in dismissing the  
 25 petition or that the petitioner should be allowed to proceed further.” *Slack*, 529 U.S. at 484.

26 In the present case, petitioner’s habeas petition is being dismissed without prejudice  
 27 as the petition is a “mixed” petition containing both exhausted and unexhausted claims, and  
 28 petitioner refuses to abandon the unexhausted grounds or return to state court to exhaust the

1 unexhausted grounds. Petitioner requests that the Court dismiss the petition so he can present his  
2 case to the appellate court. The Court did not reach the merits of petitioner's claim. No reasonable  
3 jurist could conclude that this Court's ruling was in error. Petitioner is not entitled to a certificate of  
4 appealability.

5 **IT IS THEREFORE ORDERED** the petition for writ of habeas corpus (docket #5)  
6 is **DISMISSED WITHOUT PREJUDICE** as the petition is a "mixed" petition containing both  
7 exhausted and unexhausted grounds for relief and petitioner refuses to either abandon the  
8 unexhausted grounds or move for a stay to return to state court to exhaust the grounds.

9 **IT IS FURTHER ORDERED** that the clerk shall **ENTER JUDGMENT**  
10 **ACCORDINGLY.**

11 **IT IS FURTHER ORDERED** that petitioner is **DENIED** a certificate of  
12 appealability.

13  
14 DATED this 4 day of August, 2009.

15  
16   
17 Edward C. Rank  
18 UNITED STATES DISTRICT JUDGE